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Supreme Court of the United States

OCTOBER TERM 1942

No. 861

LEWIS W. GILBERT,

Petitioner,

vs.

GENERAL MOTORS CORPORATION,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Plaintiff's petition in many instances fails to distinguish between statements of fact, supported by the record, and mere argument of counsel *dehors* the record. We believe it necessary to restate some of the facts.

Statement

This is a so-called "submission" case—i. e., plaintiff says defendant appropriated and used an idea submitted by plaintiff. It went to trial on a third amended complaint (R. 2) which alleges three separate confidential submissions to defendant of an unpatented switch, asserted to be novel, and claims damages for the subsequent copying and use of that switch by defendant on its Buick automobiles. The opinion of the District Court (R. 32) is reported in 41 F. Supp. 525 and that of the Court of Appeals (R. 861) in 56 U. S. Pat. Q. 483, not yet in Federal Reporter.

The primary question in an action such as this is one of fact: Did the defendant copy and use the device of

plaintiff? This question was answered in the negative by concurrent findings of both of the lower courts (R. 47 and R. 866):

"The Buick switch has nothing in common with that of Gilbert except use of vacuum control and a mechanical connection to the accelerator. These features are entirely different in construction and function in the Buick device and that of Gilbert."

Without proof of similarity of defendant's structure with that of plaintiff and the use of a similar mode of operation, there can be no liability on defendant's part and it makes no difference whether or not there was a confidential submission by plaintiff or whether or not the devices submitted were novel. The *fact* of confidential submission, the *fact* of novelty and the *fact* of copying by defendant must all be proven. As plaintiff's counsel said on the trial (R. 68):

"As I said, unless we establish priority, we are just out the window, because if they knew all about it, as they say they did, that is an important issue. * * * Now, as I say, we have to establish priority or we are out, even though there was a disclosure and even though they copied our device. We had no property rights in it if it was anticipated by somebody else, whether they knew about it or not, if they found it out later."

And again (R. 72):

"* * * [plaintiff] is obliged to establish that they took from him something that was original with him. That is his case. If they took something from somebody else, then, of course, he is out of luck. It doesn't make much difference whether they took it before or after the disclosure because he no longer has any originality. The date of the invention is highly material here."

The question of novelty of plaintiff's switch was likewise found against plaintiff by the concurrent findings of both courts below (R. 47 and R. 866):

"These features are both found in the prior devices of Kauffman¹ and Collins."

The third issue in such an action for damages is the *fact* of a confidential submission. Both courts found that plaintiff's switch was first submitted on September 10, 1931 by one Watkins, acting for plaintiff, to Findley, an employee of defendant's Delco Appliance Division at Rochester, N. Y. This division manufactured only *household appliances*. The courts also found that neither Findley nor Watkins took the switch apart or made a sketch of it (R. 864); further it was found by both courts that there was no evidence that Findley (R. 42) ever told any of defendant's other employees what he learned of it (admittedly Findley himself had nothing to do with the defendant's design or manufacture of the Buick switch). There was no finding that the disclosure to Findley was in confidence, and not an iota of evidence to that effect.

That Watkins did visit Findley on September 10, 1931 is proved by two letters in evidence which were written after the visit (R. 566 and R. 567), but defendant doubts that the switch actually shown to Findley was the plaintiff's switch here in controversy. Rather it seems that what Watkins did show to Findley was an earlier switch, already patented and that switch admittedly was never used by defendant. That earlier patented switch is the only one mentioned in the correspondence (and it is shown in a drawing placed on one of the letters by Gilbert himself, R. 566); this was found to be the fact by the District Court and the finding was not disturbed by the Court of Appeals (R. 42, findings 2e, 2f and 2g). Unfortunately Findley died several years before the complaint was filed (R. 42) and was not available to testify for defendant.

Watkins alone testified by deposition (R. 260-323) as to what was said and done at the Rochester visit and the only items of documentary evidence were the two letters above

¹ The prior switches of Kauffman and Collins will be described at p. 11 of this brief and their significance explained.

referred to. Watkins was not produced at the trial as he was subject to arrest in New York State (plaintiff's witness, Yells, Sheriff of Seneca County, N. Y., R. 256). By his own assertion he was not a disinterested witness for he claimed a 24½% interest in Gilbert's switch (R. 318). Watkins was believed only in part (R. 42) and even he never testified that he had submitted whatever he did submit to Findley, in confidence. The device said to have been submitted *was not produced in Court nor otherwise accounted for*, though Watkins said he thought Gilbert had it (R. 314) and Gilbert never denied it.

While defendant does not believe that there is adequate proof of the fact that Watkins showed the plaintiff's device in question to Findley, it will not here urge a ruling contrary to the concurrent findings of the lower courts. But it does most strenuously contend that Watkins' testimony establishes neither the existence of a confidential disclosure—the two persons present thought they (R. 42, g) were talking about the device of a publicly issued patent—nor does it establish the *use* of the disclosed device by defendant.

Both courts found as a fact that the evidence did not sustain the allegation (R. 5, fol. 14) of a *second* submission to defendant (R. 42, 43; R. 864, 865) which was asserted to have taken place in Detroit. No further regard need be given to this allegation because petitioner, now, has apparently abandoned it.

The *third* alleged submission took place on January 7, 1932 when one of plaintiff's switches was sent to Prescott (R. 588), one of defendant's engineers at Anderson, Indiana. Also on January 11, 1932 a copy of Gilbert's patent application (filed October 13, 1931) and some instructions for installing his switch (R. 596, 597) were sent to defendant. There is considerable correspondence in evidence; a letter of February 26, 1932 (R. 600) from Gilbert's associate is of particular significance for it accentuates a distinctive feature of the operation of Gilbert's switch which is not present in the accused switch of Buick:

"The wire which attaches to the throttle arm, *has no function in starting the starter; but serves to keep the starter cut out as long as the throttle is open.*"

Plaintiff offered no proof that this 1932 submission was either intended, or understood to be, in confidence; indeed, it was demonstrated that prior to that time plaintiff had generally (R. 107-109, 159, 205) offered his switch to other companies without any attempt to keep the matter confidential and had sold one of them to a company for twenty dollars. But regardless of this fact, plaintiff was held not entitled to any recovery here because defendant had already designed and adopted its own switch and this switch is essentially different in structure and mode of operation from that of plaintiff.

Before discussing the origin and history of the Buick switch we will describe the defendant's switch and compare it with that of plaintiff. The descriptions and comparison in the petition are inadequate (p. 11) and confusing. Both courts found essential differences between the structures of the two switches and specifically held that they were designed for a different purpose and operated in a different manner (R. 46, findings 22, 23; R. 866, 868):

1). In the device of Gilbert, the control switch is *normally closed* and the only thing which must be done to cause the starting motor to become operative is to close the ignition switch. This device is known in the record as a "key start" device. Defendant's device on the other hand employs a *normally open* control switch and the mere closing of the ignition switch will not cause operation of the starting motor (R. 39, finding 2 (a); R. 866; last par.) and it is, therefore, not a "key start" device.

2). The mechanical connection between accelerator pedal and switch performs a different function in the two devices. With plaintiff, depression of the accelerator pedal either pulls the contacts apart when the engine is not running or holds them apart if the engine stalls so as *to prevent the*

closing of the electrical starter circuit. As was said in plaintiff's letter of February 26, 1932 (*supra*, p. 4; R. 600):

"The wire which attaches to the throttle arm *has no function in starting the starter* * * *."

Defendant's switch operates entirely differently; depression of the accelerator pedal is used *to close the starter circuit* and is not used *to prevent the closing of the starter circuit* (R. 39, finding 2 (b and c); R. 867, last par.; Dyer, R. 518-522).

3). In plaintiff's device one of the electrical contacts is mounted on the piston and the vacuum created in the manifold of the engine, when it has started to operate under its own power, *pulls* the contacts apart and upon a drop in vacuum, if the engine stalls or is stopped by the operator, the contacts will automatically close under the influence of a spring unless prevented by the continued depression of the accelerator pedal. Vacuum, on the other hand, *does not pull the contacts apart* in defendant's device nor does it hold them apart; vacuum merely declutches or disables the connection between the accelerator pedal and switch operating arm so that the contact of the switch is permitted to rotate to open position under the influence of a torsion spring. With defendant's switch, if the vacuum should drop, the switch contacts will *not automatically close*, regardless of whether the accelerator is held in either a depressed or an off position (R. 40; findings 2 d and e; R. 866, last par.).

4). With plaintiff's switch there will be an automatic restarting of the engine, should it stall, unless the switch contacts are held apart by the operator, whereas with defendant's device nothing will happen if the engine stalls until the operator redeclutches the switch operating arm by taking his foot off of the accelerator pedal and again *depresses* the accelerator pedal to rotate the switch contacts to closed position (R. 40, 41, findings 2 (h) and (i); R. 866, fol. 871).

Because of these radical differences between the devices of plaintiff and defendant, it was inevitable that the Court of Appeals should agree with the District Court and say (R. 866):

"The Buick switch has nothing in common with that of Gilbert except use of vacuum control and a mechanical connection to the accelerator. These features are entirely different in construction and function in the Buick device and that of Gilbert."

Under this state of facts, conclusively established by defendant's proofs and not questioned by any of plaintiff's witnesses, no court could find that defendant has in fact copied the device of the plaintiff Gilbert and is liable to account to him. The two devices are distinctly different in construction, mode of operation and result.

Burr v. Duryee, 1 Wall. 531, 572.

Westinghouse v. Boyden Power Brake Co., 170 U. S. 537, 568.

It is significant that plaintiff's petition totally disregards the testimony of his only witness in regard to the structure and operation of the Buick switch and relies upon arguments of counsel which are not based upon anything in the record. For example, the claimed similarity of defendant's device to an electric light socket (petition, p. 12): nowhere in the Record is there any basis for this statement and it has never been used by counsel before it appeared in the petition; also mechanically it is incorrect. Plaintiff's sole witness on the operation of defendant's switch was Mr. Frank Keiper, who was attorney of record for plaintiff below and is on the petition as of counsel here. It developed on cross-examination that he knew very little about the structure and operation of the Buick switch (R. 232).

Origin of the Buick Switch

The Buick switch was designed by John B. Dyer, plaintiff's engineer at Anderson, Indiana. He started his development work in April, 1931 (R. 327) in connection with some earlier vacuum switches designed for defendant by Hill and Blake (R. 420). On September 10, 1931 (R. 640) Dyer designed his first starter, which was not of the "key-start" type (R. 356) but required the manual operation of the accelerator pedal. The drawing and a long report (R. 637), dated September 15, 1931, are in evidence. The report is of interest because it shows that Dyer already knew about a manually operated vacuum switch designed by Collins which had been submitted to defendant (R. 672) in January, 1931. The Collins' switch is like that of Buick (R. 519) in that it is a normally open switch and depression of the accelerator pedal is necessary in order to close the switch (findings 16-19, R. 45; R. 866; *infra*, p. 11).

On September 29, 1931 Dyer (R. 359) made a drawing of a vacuum operated starter switch (Ex. A-17; R. 643) in which the accelerator pedal is used to close the starter circuit and in which vacuum disables the connection between the accelerator pedal and the switch closing lever of the switch. Drop in vacuum will not recouple the connector but it is necessary for the operator to return the accelerator to the normal position and again depress it to close the switch. In other words, it is not a "key-start" device like Gilbert's, but is a normally open switch closed manually to crank the engine, like that of Buick.

Immediately after Dyer made his sketch on September 29, 1931 working drawings were prepared (the date, October 10, 1931 is now *conceded*, R. 646) and the device constructed (physical exhibit, A-59) and put in operation on a car on November 3, 1931 (Ex. A-37, R. 649).

Dyer testified (R. 384) that he had never heard of Gilbert or his switch at the time he made and operated Exhibit A-59, and did not learn anything of it until the Spring of

1932 (R. 350). Dyer did, however, know about Collins' device even as early as the date of his drawing, A-13, which was made September 10, 1931—this fact was reluctantly admitted in plaintiff's brief in the Court of Appeals (p. 37):

"Nevertheless, we cannot deny that Dyer might have learned something of the Collins device, or scheme, as he puts it, early in September, 1931. His letter (Defendant's A 12, R. 637) indicates that, and also indicates that he has embodied this scheme in Defendant's A 13."²

The next type of switch designed by Dyer is in evidence as Exhibit A-58 and is shown in a series of drawings dated November 17, 1931 (Exs. A-41 to A-47; R. 654). This device differs from Exhibit A-17 (Sept. 29, 1931) and from the *commercial* Buick switch (Ex. A-62) in that vacuum pulls the contacts apart but it is like those switches in that the contacts are closed by operating the foot accelerator as distinguished from Gilbert's "key-start" device. As Dyer had already designed and operated A-17 which Buick followed, this A-58 of November 17, 1931 switch is of interest here merely because petitioner, without any basis in the record, has again and again asserted that a patent application filed on the Buick *commercial* switch was in interference with Gilbert in the Patent Office. This assertion is contrary to the fact. The fact is that the Buick switch application of Dyer was never in any interference, whereas the Dyer application disclosing the A-58 switch was in interference with Gilbert and Lachapelle.

It is incredible that petitioner should continue the misstatements about the interference unless he still does not understand the operation of the Buick switch, for Mr. Keiper was attorney for the Gilbert application in the Patent Office and must be familiar with the particular Dyer application there involved and the Dyer application on the Buick switch is now an issued patent. Indeed our belief that plaintiff actually knows the facts yet continues the mis-

² Petitioner seems to assert the exact contrary here, at page 9.

statements is confirmed by the fact that the complaint (R. 7) in the case at bar correctly refers to the Dyer application which shows Exhibit A-58 as having been involved in the interference. Unfortunately the Court of Appeals was misled in this matter and speaks of the Buick switch as having been in interference. The District Court had made no finding on this matter as there was no evidence offered on it. But petitioner can take no comfort from his success in misleading the court because the interference and the subsequent suit in the District of Columbia denied him priority and held that Lachapelle was the first inventor of the single count in the interference (*Gilbert v. Lachapelle et al.*, 127 F. [2d] 750).

The count involved in this interference (R. 4, par. Ninth) is really of no moment for it does not read upon the commercial Buick switch:

"A starter switch for internal combustion engines comprising, a circuit opening and closing means, pressure responsive means connected with the first named means for operating the latter means, an accelerator pedal, and control means for said pressure responsive means operatively connected with said accelerator pedal for controlling said pressure responsive means to hold the circuit opening and closing means in circuit opening condition."

In the Buick device neither the vacuum operated diaphragm nor any other pressure responsive means is "connected" to the "circuit opening and closing means" (which must be the switch contacts). Nor is the accelerator pedal "operatively connected" to a control means or the diaphragm or any other pressure responsive means for the purpose of "controlling said pressure responsive means to hold the circuit opening and closing means (the switch contacts) in circuit opening condition". As distinguished from Buick, the accelerator pedal of Gilbert's device is, in fact, "operatively connected" to the suction operated piston which carries the movable switch contact to hold the plunger down, i.e., in "circuit opening condition" when the accelerator is depressed.

In view of the foregoing, the fact that some other application of Dyer was involved in interference with Gilbert on this count, constitutes no admission that the *Buick switch* is the same as the switch of Gilbert in any particular.

If the issue of the interference did, in fact, apply to Buick the decision of the Court of Appeals for the District of Columbia would be an adjudication here (127 F. [2] 750), since it would be a holding that Gilbert did not originate it, which, on counsel's statement (*supra*, p. 3) is fatal to plaintiff's case.

The Prior Devices of Collins and Kauffman

Collins had invented his accelerator-pedal-operated starter switch in August 1929 (R. 441)—the date is now conceded (R. 452)—and submitted it to defendant in January 1931. The original switch is in evidence (Ex. C-36 and a photograph, Ex. C-38, R. 732). Dyer was familiar with the Collins switch by September 15, 1931 (R. 637).

Fundamental characteristics of Collins which are present in Buick but absent in Gilbert's switch (R. 519):

(a) It is not a "key start" device but requires the manual depression of the accelerator pedal to close the starting circuit.

(b) The starter switch is not normally closed.

(c) The vacuum operated member does not move the switch contacts apart.

(d) Removal of the operator's foot from the accelerator when the engine stalls will not close the starter circuit.

(e) A spring is not used to close the starter switch.

(f) A spring is used to open the switch.

(g) Vacuum does not open the Collins switch, it *disables* the mechanical connection between the switch actuating

lever and the accelerator pedal which permits the switch to open by spring pressure.

(h) After the vacuum device has disabled the connection between accelerator pedal and switch lever, the accelerator is free to perform its normal function in the operation of the car and does not hold the switch open.

(i) Application of vacuum does not progressively decrease the contact pressure of the switch contacts.

(j) Fluctuations or ripples in the degree of vacuum will not cause the starter switch to chatter.

(k) Fluctuations in the vacuum can cause no damage to the pinion gear and ring gear of the starter system.

(l) The switch is not held in open position by vacuum, nor by depression of the accelerator.

Kauffman submitted several different types of switch to defendant and Dyer knew about them before he ever heard of Gilbert (R. 399).³

Two of the *Kauffman* switches (D-19 and D-27) are of particular importance for they negative invention in Gilbert and a third switch (D-23; D-24, R. 575) operates like the Buick switch, for vacuum *disconnects* the actuator from the switch. The original devices are all in evidence.

Exhibit D-19. This starter switch was described in detail by Mr. *Kauffman* (R. 473-6); it was designed in 1928 and embodies a means operated by the accelerator pedal to positively prevent closing of a suction opened control switch when the vacuum falls and is incapable of holding the switch open. It was installed on a Chrysler car and was in successful daily use by Mr. *Kauffman* as early as the early summer of 1928 (R. 473). J. W. McDonald who

³ Petitioner is in error in saying that the Court of Appeals took this statement from respondent's brief there, and not from the record (Pet. p. 9).

was associated in business with Kauffman from 1927 to April 1929, corroborated the identification of the exhibit and stated (R. 498) that he had seen it installed on the Chrysler.

This switch is much like that of Gilbert in that the switch is operated by vacuum and held open by the accelerator pedal. Thus, as admitted by plaintiff's counsel, Gilbert can not prevail against defendant in any event, for he can not establish priority over Kauffman (R. 68).

Exhibit D-27. This switch of Kauffman is important because it was shown to defendant a *few days after August 31, 1931* (and therefore earlier than Gilbert's first assertion of submission). It is an improved form of D-19, operating in the same way, but designed for a different form of starter drive.

On August 27, 1931 Mr. Kauffman wrote (Ex. D-1; R. 733 to Mr. Mooney, then vice-president of defendant in charge of exports and told him about the switch of Exhibit D-27 and asked him for a letter of introduction. They had been classmates at the Case School of Applied Sciences in Cleveland (R. 457). On August 31, 1931, Mr. Mooney gave Kauffman two letters of introduction (Ex. D-3 and Ex. D-4; R. 736-737) and between that date and Labor Day, *he showed drawings* (Exs. D-7, 8, 9; R. 741-743) of *his switch and modifications of it* to Mr. C. E. Wilson (R. 459), vice-president of defendant. Then on October 16, 1931, Kauffman showed Exhibit D-27 to Mr. Hunt and left drawings of the device with him, and these drawings were sent on to Mr. Prescott at the Delco-Remy division at Anderson, Indiana.

It is clear from the foregoing that a starter switch device, including means operated by the accelerator pedal to prevent closing of the switch at low vacuum, was submitted to defendant prior to any claimed submission by Gilbert of such a device. Therefore the defendant can owe nothing to Gilbert, even if defendant had used such a device, which it did not do.

Errors Urged by Petitioner

We shall now take up point by point the errors urged by petitioner and the reasons assigned for seeking a Writ. The record demonstrates, we believe, that the Courts below correctly found the facts and applied the law in dismissing the complaint.

Error 1 (petition, p. 6): The fact is that there was *no* evidence whatsoever that Findley informed other employees what he learned about the device Watkins showed to him. Lovett, the patent attorney assigned to Delco (R. 408), Halblieb, general manager of the plant (R. 366), and Wallis, research engineer (R. 367), all knew and worked with Findley but never heard him mention Gilbert's starter, and no report was found in the files. Likewise Dyer specifically testified that he first learned of the Gilbert switch in the Spring of 1932 (R. 350) and had never even heard of Gilbert or his switch when he designed the Buick switch (R. 384). Petitioner admitted in his brief before the Court of Appeals that he had failed to make his point (p. 31). When Dyer did learn of Gilbert's switch he adapted none of it (R. 522).

Error 2 (petition, p. 6): The submission to a manufacturer of a device devoid of novelty without any intention or understanding, by either party, that it was in confidence, raises no trust relationship with respect to the device. Neither Watkins nor anyone else stated that any of plaintiff's submissions were intended to be in confidence and Watkins' call on Findley was entirely voluntary (R. 101) and not at the request of Findley or anyone else in defendant's employ. But even if the law were otherwise, defendant did not in fact adopt plaintiff's switch nor profit by the submissions and there can be no liability under such a state of facts as this.

Error 3 (petition, p. 6): Petitioner's only witness to the structure of defendant's switch was Mr. Frank Keiper, petitioner's attorney, and he admitted he could not tell how the device operated (R. 232). Petitioner makes no mention of his testimony. The burden of proving similarity of two devices just as in proving infringement in a patent case rests upon plaintiff who asserts it. But defendant did in fact prove, through its witness Dyer (R. 516-522), and by demonstrating the devices to the trial court, that the Buick switch is totally unlike that of Gilbert, in structure, mode of operation and result. Both courts found for defendant on this point (R. 39, findings 2 a to 2 j and R. 866).

Error 4 (petition, p. 4): The fact is that there is substantial evidence in the record that the Buick switch and that of Gilbert are so essentially unlike that one could not have been copied from the other. The testimony of Dyer established the essential differences and there is no testimony to the contrary. The concurrent findings of the Courts below should not be disturbed for there is no conflict with courts in other Circuits.

Thompson Spot Welder Company v. Ford Motor Company, 265 U. S. 445, 447.

Texas & New Orleans Railroad et al. v. Brotherhood of Railway & Steamship Clerks et al., 281 U. S. 548, 558.

General Talking Pictures Corp. v. Western Electric Co. et al., 304 U. S. 175, 178.

Error 5 (petition, p. 6): Dyer made drawing A-17 (R. 643) on September 29, 1931 (R. 359) and the Court of Appeals, affirming the District Court, correctly found that Dyer invented the defendant's switch. The court below likewise was not in error in holding that Dyer had the benefit of Collins and Kauffman; Dyer testified (R. 399) that he knew about Collins and the fact is also mentioned by Dyer in his report dated September 15, 1931 (R. 637).

Dyer also testified about his knowledge of Kauffman (R. 399) before he learned of Gilbert.

Error 6 (petition, p. 7): There can be no interference, *as a matter of law*, between two devices which are so entirely dissimilar *in fact* as those of Buick and petitioner.

Error 7 (petition, p. 7): Petitioner misconstrues the significance of Lachapelle. The switch of petitioner and that of Lachapelle (R. 500; Ex. E-2, R. 779) have three important features in common: both are "key-start" devices, in both vacuum pulls the switch contacts apart, and in both the accelerator pedal is used to *prevent* the closing of the switch contacts but performs no function in closing the switch. Applications covering these two switches were in interference and Lachapelle was awarded priority of the count by the Patent Office. Then followed an unsuccessful suit by plaintiff under Revised Statutes Section 4915 (35 U. S. C. 63 and 72a), affirmed on appeal by the Court of Appeals for the District of Columbia (127 F. [2d] 750). Therefore, between Gilbert and Lachapelle the latter has been determined to be the first inventor of the subject matter of the interference. As Lachapelle's assignee, defendant would be entitled to avail itself of the priority award to Lachapelle as against Gilbert but this has nothing to do with the present controversy because defendant does not manufacture and sell a starter which employs the three distinctive features common to the switch of Lachapelle and Gilbert, nor one which embodies the count of the interference (*supra*, p. 10).

Error 8 (petition, p. 7): The courts below committed no error in regard to the proper interpretation of the Federal Rules of Civil Procedure and the evidence clearly established that plaintiff failed to prove his case.

Error 9 (petition, p. 7): The record conclusively proves that there is no novelty in the Gilbert switch and that defendant did not copy any feature of it—either in structure

or operation. Independently of Gilbert Dyer designed an entirely different switch for Buick which in its principal features of construction and operation was the same as the earlier devices of Collins and Kauffman.

Petitioner's Reasons

1 and 2 (petition, pp. 7, 8): The decision in the case at bar is not in conflict with the case of *Hoeltke v. C. M. Kemp Mfg. Co.*, 80 F. [2d] 912, nor with any of the cases cited on page 9 of the petition for the reason that the courts below concurrently found as a fact, upon substantial evidence, that the device of defendant and that of plaintiff were not similar and that defendant had not copied any feature of the plaintiff's switch.

On page 8, petitioner again states that in the interference Dyer swore that the Buick device was essentially the same as that of plaintiff; this is not the fact. The Dyer application there involved *was not the Buick switch*, as we have shown above (p. 9).

3 (petition, p. 9): This "reason" is based upon a misinterpretation of the Court of Appeals' opinion; what the Court did say in regard to Collins and Kauffman is supported by the evidence (R. 865, 866):

"In doing his work Dyer had the benefit of some other devices which had been submitted to the defendant and which should be mentioned briefly. One was by Collins * * * a man by the name of Kauffman also submitted several devices which Dyer had available for use before he perfected the Buick switch and *before he became acquainted with the plaintiff's switch.*"

Dyer knew of Collins in September, 1931 (R. 637) and of Kauffman (R. 399) by October, 1931, whereas he did not learn of Gilbert until the Spring of 1932 (R. 350, 384).

4 (petition, p. 10): This section of the petition is so confused that it is impossible to understand what petitioner

intends. The only point about Lachapelle is that Gilbert cannot claim to be the inventor of even the count of the interference for priority was awarded to Lachapelle, so that if the count did read on Buick the plaintiff could not prevail in this case. However, defendant does not employ a structure which is within the description of the only claim involved in that interference (*supra*, p. 10). Certainly the cases cited are in no way in point and the case at bar is not in conflict with them.

5 (petition, p. 11): This section of the petition is based upon a misdescription of the Buick switch and a confusing comparison of an electric light socket for which there is no basis in the record. Also there is no basis in fact for reference to two helical springs above and below the diaphragm, "designed to force the contact points into the same place" (p. 12); it is merely an unjustified attempt to argue similarities in operation between Buick and Gilbert which do not exist. We have already stated the essential differences (*supra*, p. 5) between Gilbert and the Buick switch and they need not be repeated.

The footnote on page 3 asserts a date of 1928 for the invention of Gilbert's Exhibit 3 but the fact is that Gilbert failed to *prove* any date prior to the fall of 1931 for his switch. He had not one iota of documentary proof earlier than the application date (Oct. 10, 1931) and all his physical switches in evidence are of vague origin (R. 93) or admittedly constructed merely for the purposes of the trial.

6 (petition, p. 13): Petitioner asserts that Rule 36a was misconstrued by the Court of Appeals but none of the cases cited is an authority for the assertion.

The facts are these: prior to the trial plaintiff served upon defendant certain requests (R. 619) for admissions, each of the requests was duly answered and the answers (R. 855) served upon plaintiff and filed July 30, 1940. It is true that the answers were signed by one of defendant's attorneys and not sworn to, but plaintiff raised no

objection at the time. Six months later the case went to trial and still plaintiff made no point of the lack of oath to the answers; indeed he himself offered proof as to the subject matter of many of the requests and made no objection to defendant's offer of proof which conclusively established that plaintiff had not proven his case. Then after the conclusion of the trial plaintiff raised a question about the answers in a brief but thereafter seems to have abandoned it again for at the hearing on the settlement of findings of fact and conclusions of law before the District Judge, he made no mention of the matter and did not suggest a finding or conclusion in regard thereto. Certainly the Rules of Civil Procedure were never designed nor intended to permit plaintiff to stand by, and only after his own evidence and that of defendant had demonstrated he had no case, then to raise a technical objection which could have been corrected had the point been raised at the proper time. Rule 1 points to the intention and purpose of all the rules:

"These rules * * * shall be construed to secure the just, speedy, and inexpensive determination of every action."

It would be contrary to every principle of justice to sustain a default based upon a point like this, tardily raised, and of no inherent merit. The opinion of the Court of Appeals remarks that it thought that if the absence of an oath to the answers was itself an admission of the truth of the requests, then plaintiff must prevail. The Court is in error about this for the requests (if deemed unanswered) do not establish that defendant has used the switch of plaintiff nor that there is any novelty in Gilbert's switch. The contrary to these two necessary elements of plaintiff's case have been established by clear and convincing evidence. The question of the interpretation of the Rule is moot in view of the proof that plaintiff, on the facts, is entitled to no recovery from defendant.

Petitioner's Summary of Facts and Law

Petitioner states nothing which warrants the grant of the writ; the essential facts were correctly found by the courts below upon ample proof and the law correctly applied thereto. We call attention to the unjustified remarks under section (4) on page 19 of the petition; they are not only irrelevant to the issues here involved but are untrue; defendant did not "lie" to Kauffman nor is it true that it "stole" his invention. Also the assertion that the submission by Kauffman on October 16, 1931, was "too late" is not in point for Kauffman first got in touch with defendant on *August 27, 1931* (R. 733), through his old friend Mr. Mooney, Vice President of defendant, and had exhibited the drawings (R. 741-743) to Mr. Wilson, President of defendant (R. 459), *before Labor Day, 1931*. This was all prior to Gilbert's first submission in Rochester and long before Dyer ever heard of Gilbert.

Conclusion

We submit that there is no conflict of decision between different Circuits and no question of public importance involved; that the facts found by the Courts below, concurrently, establish that defendant did not copy anything submitted to it by petitioner and therefore the case of *Hoeltke v. Kemp*, and other cases cited by petitioner, do not apply and the judgment is not in conflict with them. Wherefore the petition should be denied.

Respectfully,

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